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In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. RICE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF

MARC VAN NUYS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

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Petitioner maintains that the trial judge improperly relied on evidence outside the record in sentencing him to a term of life imprisonment.

1. Petitioner, a member of the United States Air Force, pleaded guilty to unpremeditated murder and aggravated assault, in violation of Articles 118(2) and 128 of the Uniform Code of Military Justice, 10 U.S.C. 918(2) and 928. He was sentenced to life imprisonment, dismissal from the service, and total forfeiture of pay. The convening authority approved the findings and sentence. After ordering a limited evidentiary hearing at the trial level on the claim that petitioner's plea was improvident (Pet. App. 28a-31a), the Air Force Court of Military Review affirmed (Pet. App. 16a-27a; 20 M.J. 764). The Court of Military Appeals also affirmed (Pet. App. 1a-15a; 25 M.J. 35).

a. As summarized by the courts below (Pet. App. 3a, 17a-21a), petitioner choked a fellow officer to death during an altercation in the victim's room at Laughlin Air Force Base in Texas. Petitioner also shot at a police officer

who responded to the scene. Petitioner was thereafter charged with premeditated murder, a capital offense, and aggravated assault. Before trial, petitioner offered to plead guilty if the convening authority reduced the murder charge to unpremeditated murder, which is not a capital offense and which permits (but does not require) the trial judge to impose a sentence of less than life imprisonment. As part of the plea negotiations, petitioner's attorneys met with the prosecutors and the trial judge to discuss the trial judge's sentencing philosophy. Ultimately, a plea agreement with the convening authority was reached (AXs 30, 31), and petitioner entered guilty pleas to unpremeditated murder and aggravated assault (II Tr. 191, 204-205). Following a sentencing hearing, the trial judge sentenced petitioner to life imprisonment and other ancillary penalties (II Tr. 415).

b. On appeal to the Air Force Court of Military Review, petitioner claimed that his pleas were improvident, on the ground that the trial judge had promised to sentence him to no more than 30 years' confinement. At a limited evidentiary hearing ordered by the court of military review, the trial judge testified that he had made no commitment, promise, or agreement to impose less than a life sentence, and that the sentence he imposed was based on the fact that the victim's hands were tied behind him when he was strangled by petitioner (Pet. App. 20a-21a). On further review before the court of military review, petitioner claimed that his sentence was unlawful. He argued that there was no evidence to support the trial judge's finding regarding the victim's condition at the time of his death. Therefore, he contended, the judge must have relied on facts outside the record.

The court of military review rejected petitioner's claim. It ruled that, in the absence of evidence indicating that extraneous information, outside influence, or command pressure had been brought to bear on the trial judge

during his deliberations on sentence, the judge's testimony at the remand hearing could not be used to impeach petitioner's sentence (Pet. App. 22a-24a).* The Court of Military Appeals affirmed the judgment of the court of military review on that basis, and it also held that the evidence before the trial judge was sufficient to support the inference that the victim's hands were tied at the time of his death (*id.* at 7a-8a).

2. A party generally may not plumb the mental processes that led a trial judge to decide upon the appropriate sentence. *Washington* v. *Strickland*, 693 F.2d 1243, 1263 (5th Cir. 1982) (en banc), rev'd on other grounds, 466 U.S. 668 (1984); *Proffitt* v. *Wainwright*, 685 F.2d 1227, 1255 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983); see *Fayerweather* v. *Ritch*, 195 U.S. 276, 306-307 (1904). Petitioner contends that he may do so in this case because the trial judge relied on extraneous prejudicial information in imposing his sentence.

Petitioner cites no evidence to support his claim; he simply asserts that the trial judge must have relied on such information, since in his view the evidence does not support the finding that the victim's hands were tied when he was strangled. The Court of Military Appeals, however, found that there was sufficient evidence to justify that inference (Pet. App. 7a). The uncontroverted evidence established that petitioner tied the victim's hands behind his back at some point before killing him (II Tr. 196; PX 49 (stipulation of fact); Pet. App. 5a). There was no evi-

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* The Court of Military Review relied on Mil. R. Evid. 606(b) (which is modeled after and substantially similar to Fed. R. Evid. 606(b)). Military Rule 606(b) prohibits a court-martial member from testifying to matters concerning the panel's deliberative processes in arriving at a sentence unless the testimony is that extraneous prejudicial information, outside influence, or unlawful command pressure was improperly introduced into the panel's deliberations. The court of military review concluded that Rule 606(b) applies equally to sentencing deliberations by a judge.

dence that the victim's hands had come untied prior to his death. The only evidence suggesting that possibility was a statement by petitioner during the plea inquiry that, before choking the victim, petitioner was hit in the head by an object which he "determined" to be the toaster whose cord he had used to tie the victim's hands (II Tr. 196; Pet. App. 5a-6a). As the Court of Military Appeals explained (Pet. App. 7a), however, that statement did not require the conclusion that the victim's hands were untied when petitioner killed him. In any event, the trial judge was not required to accept petitioner's statement as true. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-576 (1985). Petitioner therefore simply disagrees with the Court of Military Appeals on the trial court's finding. That dispute does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF

MARC VAN NUYS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate
Counsel Division

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